STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
DIANE BREGENHORN,	)		
	)		
Complainant,	)		
	)		
and	)	CHARGE NO:	1998SF0296
	)	EEOC NO:	21B980273
CC SERVICES, INC.,	)	ALS NO:	S-10596
	)		
Respondent.	)		

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Springfield, Illinois on September 17, 2003. Respondent has filed a post-hearing brief. Complainant has not filed a post-hearing brief, although the time frame for doing so has expired.

Contentions of the Parties

In the instant Complaint, Complainant states that Respondent unlawfully retaliated against her by threatening to discharge her from her insurance sales position in July of 1997 after she had protested to her supervisor about Respondent's practice of denying applications for insurance from individuals, who were over 72 or were living in a particular geographical area. Respondent submits that Complainant was threatened with discharge for reasons other than her protest of either age discrimination or "redlining". It also contends that a mere threat to discharge an employee, standing alone, is not a material adverse act cognizable under the Human Rights Act.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. In January of 1995, Respondent, CC Services, hired Complainant as a trainee insurance agent. Under the terms of her employment, Complainant was considered a "captive" agent requiring that she sell only insurance products offered by Respondent.

2. At all times pertinent to this Complaint, Randy Jackson served as Complainant's supervisor. When Complainant was hired, Jackson set forth a list of eleven "expectations" that he required Complainant to follow. Among these expectations, Jackson required Complainant to develop a marketing strategy for solicitation of new insurance business, solicit 20 individuals to purchase a life insurance product each month, attend staff meetings and seminars and maintain a positive attitude towards her career.

3. When Complainant was first hired as a trainee, it was with the understanding that Complainant would be paid a salary of $2,400 per month, and that Respondent would pay all of her office expenses. After the first five month period, Complainant was paid on the basis of commissions on her sales of insurance policies, and Complainant was responsible for all of her own office expenses including rent and any salaries of support personnel. Complainant maintained this status through her tenure with Respondent.

4. On May 29, 1997, Complainant attended training meeting for new agents with Jackson. At some point during the meeting Jackson learned that Complainant had failed to bring certain training materials to the meeting as requested by Jackson. Complainant told Jackson in front of the new agents that she was tired of spending money to correct company shortcomings, and that she had incurred problems with respect to Respondent's billing systems, lost transmittals, underwriting, and support staff.

5. On June 6, 1997, Complainant and Jackson held a meeting with respect to Complainant's conduct at the May 29, 1997 meeting. During the meeting Jackson expressed displeasure at Complainant for not having brought the requested training materials and told Complainant that the May 29, 1997 meeting was not the appropriate forum to discuss with new agents her concerns about Respondent's procedures.

6. On July 18, 1997, Jackson sent a letter to Complainant that essentially outlined her conduct at the May 29, 1997 and the June 6, 1997 meetings. The letter also mentioned, among other things, Jackson's perception of other deficiencies in Complainant's performance, including: (1) Complainant's 78 percent life persistency rating (and Complainant's need to renew with Respondent four of her own life insurance policies that had lapsed); (2) a February 1997 incident involving another agent doing an insurance demonstration at a local high school; (3) Complainant's need to generate a marketing strategy to combat what Jackson perceived was a declining production in insurance policy applications; and (4) Complainant's failure to maintain a positive attitude toward her career. The letter further informed Complainant that Jackson was disappointed with her negative attitude toward home office personnel and the agency, as well as her levels of sales, service and cooperation. Finally, the letter cautioned Complainant that if the situation was not corrected, it could result in her termination.

7. At some point between July 18, 1997 and September 5, 1997, Complainant met with Jackson and Vann Parkin, Respondent's district manager in the St. Louis region, to discuss the contents of the July 18, 1997 letter. After the meeting Jackson sent a letter to Complainant on September 5, 1997, that mentioned most of Jackson's perceptions of Complainant's job-related short-comings that were contained in the July 18, 1997 letter. The letter also repeated the warning that if Complainant's level of sales, service and cooperation did not improve, it could result in the termination of her contract with Respondent.

8. On September 5, 1997, Complainant had a meeting with Darnell McDonnell, an African-American policyholder who lived in East St. Louis, about an automobile claim that he had made with Respondent. In order to try to resolve the matter, Complainant put the claims adjuster on the speakerphone with McDonnell present without initially telling the claims adjuster that McDonnell was present. After the call had been made, the claims adjuster telephoned Jackson to complain about having to discuss the claim in front of McDonnell.

9. On September 5, 1997, Jackson went to Complainant and had a heated discussion about why Complainant should not have made the telephone call to the claims adjuster in the presence of McDonnell. He also told Complainant that there was some question about the legitimacy of McDonnell's claim. At some point during the discussion, Jackson asked Complainant why McDonnell had been written into a "preferred" company that charged McDonnell at a lower rate when he had previously been written a policy from a high risk insurance company that had charged him a higher rate because of his past problems on his auto insurance record. At no time during this discussion did Jackson instruct Complainant not to generate policy applications for preferred insurance companies from individuals living in the East St. Louis area.

10. At some point at or near September 19, 1997, Complainant had a conversation with Jackson about a "leads" program which required insurance agents to purchase names and telephone numbers of individuals who might be interested in purchasing insurance. During the meeting, Jackson instructed agents that they should not bother quoting insurance to individuals over the age of 72, or who had a "D" credit, or who responded as not being interested in a quote. Jackson also told Complainant that she would be charged either a reduced fee or no fee for individuals in these categories. Complainant questioned Jackson about not marketing insurance to these people.

11. On September 19, 1997, Complainant wrote an e-mail to Jackson's assistant seeking a refund from what was being charged to her under the leads program. In the e-mail, Complainant indicated, among other things, that she would be taking a full $10.00 credit from her bill for one person who was 72 years old and had an "A" credit rating.

12. On October 23, 1997, Complainant filed a Charge of Discrimination, alleging that Jackson subjected her to unequal terms and conditions of employment based on her sex by threatening her with discharge if she did not maintain certain life insurance policies, increase her production, or participate in a telephone marketing program, and by failing to offer her a career agent contract when other similarly situated male co-workers were treated more favorably. Complainant also alleged that Jackson's July 18, 1997 letter was a form of unlawful retaliation for having protested redlining and age discrimination.

13. On November 17, 1998, the Department of Human Rights filed with the Commission a two count Complaint, alleging unequal terms and conditions of employment based on her sex and unlawful retaliation.

14. On February 5, 1999, Complainant filed a motion to stay the instant proceedings pending resolution of a lawsuit that she had filed against Respondent in federal court. The federal lawsuit alleged discrimination on many of the grounds mentioned in Complainant's Charge of Discrimination, but mostly concerned Complainant's subsequent termination from Respondent. In the motion to stay the instant proceedings, Complainant indicated that she would dismiss this case if she obtained a favorable result in federal court, but would seek to resume this case with the Commission if she received a negative result in federal court. On February 22, 1999, Judge Carol Kirbach entered an Order which granted the motion to stay after noting that Respondent had filed no objection to the request.

15. On January 29, 2001, the federal district court entered an order which granted Respondent's motion for summary judgment on the federal matter. In the Order, the federal district court noted that it was limiting its consideration of Complainant's retaliation claim to her allegation that she was discharged because she had filed a sex discrimination charge with the Illinois Department of Human Rights.

16. On April 20, 2001, Complainant filed a motion seeking to lift the stay previously imposed by the Commission. After granting Respondent an extension of time to file a response, Respondent eventually filed a motion to dismiss the case with prejudice based upon the ruling by the federal district court. In her response, Complainant did not essentially contest Respondent's argument that the doctrine of *res judicata* applied to Count I of the instant Complaint, but rather argued that the federal district court "erred" in granting Respondent's motion for summary judgment as to the sex discrimination aspects of her claim.

17. On April 10, 2002, an Order was entered which granted the motion to dismiss in part, which resulted in Count I of the instant complaint alleging unequal terms of conditions of employment based on Complainant's sex being dismissed with prejudice based on the ruling of the federal district court. The Order further held that the doctrine of *res judicata* did not preclude Complainant from pursuing Count II of the Complaint alleging retaliation arising out of Jackson's issuance of the July 18, 1997 letter since that separate occurrence was never alleged or at issue in the federal complaint.

18. After Respondent's motion for reconsideration of the April 10, 2002 Order was denied, counsel for Complainant ultimately withdrew from the case on November 22, 2002. After Respondent obtained discovery on the issues that were relevant to Count II, this matter went to a public hearing on Count II with Complainant acting as a *pro se* litigant. Although Complainant was given an extension of time to retain counsel in

order to file a brief on her own behalf, she has not filed a brief by the January 14, 2004 due date for doing so.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant has failed to establish a *prima facie* case of retaliation in that Complainant failed to show either that she suffered a materially adverse act or that any adverse act occurred after engaging in a protected activity.

4. The doctrine of *res judicata* bars subsequent actions when the record reflects that: (1) there is an identity of the parties; (2) there is an identity of the cause of action; and (3) there is a final judgment on the merits rendered by a court of competent jurisdiction.

Determination

Complainant has failed to establish by a preponderance of the evidence that Respondent subjected her to unequal terms of conditions of employment or retaliated against her for engaging in protected conduct in violation of sections 2-102 and/or 6-101(A) of the Human Rights Act (775 ILCS 5/2-102, 6-101(A)) when Respondent issued the July 17, 1997 letter seeking to improve Complainant's productivity and threatening her with discharge.

Discussion

Retaliation.

Section 6-101(A) of the Human Rights Act (775 ILCS 6/6-101(A)) forbids an employer from retaliating against an employee where the employee either "has opposed that which he or she reasonably and in good faith believes to be unlawful

discrimination…[or] because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the [Human Rights Act]." Ordinarily, a complainant may establish a *prima facie* case of retaliation by showing that: (1) she engaged in a protected activity that was known to the alleged retaliator; (2) respondent subsequently took some materially adverse action against the complainant; and (3) a causal connection exists between the protected activity and the adverse act. See, **Ballard and Peoria School District No. 150**, 38 Ill. HRC Rep. 58, 73 (1988), and **Canady and Caterpillar, Inc.**, ___ Ill. HRC Rep. ___ (1994SA0027, March 17, 1998).

In the instant matter, Complainant contends that she was the victim of unlawful retaliation when, after protesting age discrimination and racial redlining with respect to the issuance and marketing of insurance products, Jackson issued a letter on July 18, 1997 that criticized her work performance and ultimately threatened her with termination. However, in **Campion and Blue Cross and Blue Shield Asso.**, ___ Ill. HRC Rep. ___ (1988CF0062, June 27, 1997), the Commission observed that the Human Rights Act does not protect individuals against every adverse thought, procedure or action, and excludes from its coverage "actions so trivial that they would not give rise to a cause of action based upon unlawful discrimination". (**Campion** at p. 9.) For example, the Commission in **Canady and Caterpillar, Inc.**, ___ Ill. HRC Rep. ___ (1994SA0027, March 17, 1998), rejected a complainant's claim that an undeserved low ranking on a performance evaluation constituted a "material adverse act" where the issuance of the evaluation had no negative affect on her rate of pay, discipline or job duties. Slip op. at p. 18.

Complainant has a similar problem in that she has not shown how the receipt of the July 18, 1997 letter threatening her continued employment had a negative effect on any term or condition of her employment with respect to her pay, benefits, discipline or

working conditions. Moreover, although we know from her federal lawsuit that she eventually was terminated from her insurance sales position, Complainant's termination is not a part of the allegations in her retaliation claim.[1] Additionally, if Complainant's view of a material adverse act is correct, employers would be subjected to liability under the Human Rights Act whenever a supervisor voices any criticism of a subordinate's job performance and ties the subordinate's continued employment to improved job performance. But that cannot be right since a supervisor's issuance of threats regarding continued employment often leads to an employee's improved performance and long-term tenure. Thus, without any consequence regarding the mere issuance of the threat, I am hard-pressed to find that a supervisor's utterance of a comment that essentially tells a subordinate to "shape up or ship out" could ever be viewed as a material adverse act. Accordingly, I find that the lack of any consequence regarding Jackson's issuance of the July 18, 1997 letter dooms Complainant's retaliation claim.

Alternatively, I agree with Respondent that Complainant failed to establish in her retaliation claim the requisite causal link between any alleged protest of age discrimination and/or racial redlining and the issuance of the July 18, 1997 letter. In **Pace and State of Illinois, Department of Transportation**, ___ Ill. HRC Rep. ___ (1989SF0588, February 27, 1995), the Commission was concerned with a similar issue where the record showed that the complainant engaged in protected activity some four days after complainant's transfer to a different job which the complainant alleged was the adverse act. In finding that the complainant had failed to establish a *prima facie* case of retaliation, the Commission emphasized that the adverse act must come after the complainant has engaged in a protected activity. Slip op. at p. 13.

[1] According to the federal district court, it was Complainant's insubordination, her negative attitude toward the company, and to a limited extent, her decreasing sales production that led to her termination, and not any prior protest of discrimination.

In this respect, Complainant has two problems. First, I doubt whether Complainant ever protested Respondent's alleged practice of redlining African-Americans living in the East St. Louis area since: (1) the record reflects that McDonnell was an existing customer at the time Complainant spoke to Jackson about McDonnell's claim; and (2) Complainant could not come up with any examples of African-Americans being denied preferred insurance policies. Moreover, while I believe that Complainant made a protest about age discrimination with respect to Respondent's failure to market insurance policies to individuals over the age of 72, Complainant's protest was registered at some point in time around September 19, 1997, or approximately two months after Jackson had issued the July 18, 1997 letter that Complainant asserts is the adverse act in this case.[2]

True enough, Complainant attempts to avoid this causation problem by pointing to Jackson's September 5, 1997 letter which essentially mirrored his concerns about Complainant's job performance that he registered in the July 18, 1997 letter. However, Jackson explained that he and Complainant had a meeting with respect to the contents of the July 18, 1997 letter, and that the September 5, 1997 letter was drafted only to correct certain statements made in the July 18, 1997 letter. Thus, even if I could look to the September 5, 1997 letter to form a basis for Complainant's retaliation claim, Complainant still loses since: (1) the September 5, 1997 letter was drafted before any age discrimination protest on September 19, 1997; and (2) the circumstances surrounding the issuance of the September 5, 1997 letter indicates that Jackson's concern about Complainant's job performance existed long before she had engaged in any protest concerning age discrimination or racial redlining.

[2] While I find that Complainant did not protest any alleged practice of racial redlining to Jackson, I note that Complainant's contention that she made the alleged protest on September 5, 1997 defeats any retaliation claim since the alleged protest came after Jackson's July 18, 1997 letter.

Sex Discrimination.

As to Complainant's allegation that she was the victim of sex discrimination when Respondent failed to offer her a career agent contract, required her to maintain certain life insurance policies, required that she meet with him on a weekly basis to account for her insurance sales activities, and threatened to discharge her for failing to participate in telemarketing activities or seminars, I will incorporate in its entirety the April 10, 2002 Order that dismissed with prejudice Complainant's Count I on the basis of *res judicata*. Suffice it to say at this juncture that Complainant did not argue in her response to Respondent's motion to dismiss Count I that the requirements for application of the doctrine of *res judicata* were not established or that the federal district court somehow did not address the issues contained in Count I of the instant Complaint when it granted Respondent's motion for summary judgment. Moreover, while Complainant argued that the federal district court "erred" when granting Respondent's motion for summary judgment, her only remedy lies in an appeal of the federal district court decision, rather than a re-litigation of Count I before the Commission.

Recommendation

For all of the above reasons, it is recommended that the Complaint and underlying Charge of Discrimination of Diane Bregenhorn be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 2ND DAY OF APRIL, 2004